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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 728

J. C. HURWITZ, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 20, 1963.*

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 36) is reported in 208 F. Supp. 594 (S.D. Tex. 1962).

The opinion of the Court of Appeals (R. 53-54) is printed in Appendix B hereto, infra p. 12.

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*Petitioners are J. C. Hurwitz, Julian Hurwitz, Lillian Hurwitz Goldberg and husband, John Goldberg.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1963 (R. 55). Rehearing was denied on October 9, 1963. (R. 59). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the adoption of a section of a statute by reference to it by some other section of the statute is construed as an adoption of the law *as it existed at the time the adopting section was passed* or *carries with it subsequent modifications of the statute adopted*, i.e., whether for purposes of the Additional Estate Tax, Sub-Chapter B, Internal Revenue Code of 1939, the definition of "net estate" which Section 935(c) adopted by reference to the 1939 definition of "net estate" set forth in detail in Section 812(c) (for purposes of the Basic Estate Tax, Sub-Chapter A, Internal Revenue Code of 1939) was changed as a result of the 1948 amendments to Section 812(c) (changing the definition of "net estate", inter alia, so as to eliminate the deduction for property previously taxed received from a predeceased spouse dying after December 31, 1947) even though Section 935(c) was not amended.

STATUTE INVOLVED

The statutory provisions involved are Sections 812(c) and 935(c) as originally set forth in the Internal Revenue Code of 1939; and as they stood as a result of the 1948 Amendments to Section 812(c). These provisions are set forth in Appendix A, commencing at page 9 thereof.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because a federal tax refund was sought, and the statutory construction principle sought to be applied related to a federal taxing statute, the Internal Revenue Code of 1939. A Complaint was filed by Petitioners, J. C. Hurwitz, Julian Hurwitz, John Goldberg and Lillian Hurwitz Goldberg on October 21, 1960 seeking a refund of estate taxes and urging application of the principle that where one section of a statute adopts by reference the provisions of another section, the adoption takes the section as it stands at the time of the adoption and does not include subsequent modifications in the section adopted, unless by express intent. Such application would have meant a holding that the 1948 amendments to the definition of "net estate" in the adopted section, Section 812(c) dealing with the Basic Estate Tax and eliminating the deduction between spouses for property previously taxed in the estate of a prior deceased spouse dying after December 31, 1947, did not have the effect of changing the definition of "net estate" for purposes of the adopting section, Section 935(c) dealing with the Additional Estate Tax; and hence such deduction was available in the computation of Additional Estate Tax.

The District Court, per Hon. J. C. Hutcheson, Jr. of the Court of Appeals for the Fifth Circuit, sitting as a special judge, refused to apply this principle, stating in his Opinion reported at 208 F. Supp. 594 (S. D. Tex. 1962) that the principle is "normally applied to a situation in which one jurisdiction has adopted a statute of another jurisdiction"; and the District Court rendered judgment for Respondent on October 2, 1962 (R. 45).

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court but did not, in its terse Opinion (R. 53-54) cite authority, and merely indicated that it approved the reasoning of Judge Hutcheson.

REASON FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict with the decisions of the Supreme Court of the United States in the following cases:

Hassett v. Welch, 303 U.S. 303, 58 S. Ct. 559, 82 L. Ed. 858 (1938);
In re Heath, 144 U.S. 92, 12 S. Ct. 615, 36 L. Ed. 358 (1892); and
Kendall v. U. S. Ex rel Stokes, 12 Pet. 524, 9 L. Ed. 1181 (1838).

Like the instant case, *Hassett v. Welch*, supra, involved sections of the federal statute imposing estate taxes (not separate statutes from different jurisdictions); and the Court there held that a provision of the Revenue Act of 1926 which adopted, by reference, another provision of the same act, was not affected by a 1931 amendment of the adopted provision, where the amendment was limited to the adopted provision and made no reference to any other provision of the 1926 Act. The Court stated:

> "A well-settled canon tends to support the position of respondents; 'Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute . . . *such adoption takes the statute as it exists at the time of adoption and does not include*

> *subsequent additions or modifications to the statute* so taken unless it does so by express intent.' " (Emphasis added.)

The Court had no difficulty in finding that this principle, applicable to two statutes, is also applicable to two sections of the same statute. The Court stated:

> "The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended."

While it might be argued in the instant case that the decision of the Court below merely represents a case of accepting but not applying this principle, because of finding an "express intent" that it not apply—rather than representing a rejection of the principle and a conflict with the above cited decisions by this Court—such an argument will not withstand analysis: in order to find the "express intent" required by *Hassett* for not applying the principle, it would have to be found, either,

(a) in the adopting section, Section 935(c); or
(b) in the 1948 Amendment to Section 812(c).

An examination of Section 935(c) however discloses no language or legislative history that it serve to adopt all future changes in the section adopted, Section 812(c); and an examination of the 1948 Amendments to Section 812(c) discloses not even a simple statement that such changes apply to Section 935(c).

Absent the *basis* for refusing to apply the principle, the refusal to apply it by the court below evidences a conflict with the pronouncements of this Court that the principle

be applied to sections of a statute in the juxtaposition of these. See Annotation, 2 L.Ed. 2d 996.

2. Clearly the principle of statutory construction involved is of importance which transcends the immediate facts of this case and transcends also the matter of interpreting federal taxing statutes. In *Kendall*, supra, for example the principle was applied by this Court in resolving a question of mandamus jurisdiction; and in *Heath*, supra, the principle was applied by this Court in resolving a question of review procedure in a criminal matter.

The principle has been recognized and applied by lower federal courts in dealing with other areas, as indicated:

United States ex rel Kessler et al v. Mercur Corporation et al, 83 F.2d 178 (C.A.3rd, 1936), cert. den. 299 U.S. 576, 81 L. Ed. 424, 57 S.Ct. 40, involving the False Claims Act, R. S. § 3490 (1878), R. S. §5438 (1878);

United States ex rel Boyd v. McMurtry et al, 5 F. Supp. 515 (D.C. Ky. 1933), also involving the False Claims Act, supra;

Olson v. Mellon, 4 F. Supp. 947 (D.C. Pa. 1933), aff'd 71 F.2d 1021 (C.A. 3rd, 1934), cert. den. 293 U.S. 615, 55 S.Ct. 147, 79 L. Ed. 704 (1934), also involving the False Claims Act, supra;

Professional & Businessmen's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D.C. Mont. 1958), involving the McCarran Act relating to regulation of the business of insurance, C. 20, 59 Stat. 33, 15 U.S.C.A. §§1011-1015.

It is reasonable to assert that there is not an area of federal statutory law immune from the problem presented

by this case, and the rights of all citizens are potentially involved and affected.

3. The result reached by the court below is believed to be erroneous not only because the decision reflects no basis for refusing to apply the mentioned principle of statutory construction, but also because Congress itself subsequent to 1948 tried to rectify its admitted "error" in denying the property previously taxed deduction between spouses by enacting a relief statute in 1956. Act of February 20, 1956, C. 66, 70 Stat. 26. This 1956 statute provided that with respect to decedents' dying after 1951, their estates would claim a credit for the federal estate tax paid with respect to the transfer of property to a decedent by the decedent's spouse dying within two years before the decedent's death. (Why this 1956 relief statute did not go back all the way to cover all spouses dying after December 31, 1947, is not clear.)

The fact that this relief statute shows Congress' impression that it had effected a denial of this deduction under Section 935(c) for purposes of the Additional Estate Tax, is not conclusive, however, as to whether it really did so err. In *Rainwater v. United States*, 356 U.S. 590, 78 S.Ct. 946, 2 L. Ed. 996 (1958) where a party had argued that a certain statutory amendment evidencing Congressional interpretation of the amended section was indicative of the interpretation to be judicially accorded the section involved, the Court rejected such argument and stated, at page 593, that "such interpretation has very little, if any, significance."

The above mentioned 1956 effort to rectify the "error" presumed to have occurred in 1948 makes it appear that at both of such times Congress was unaware of the con-

trolling operative effect this Court and other federal courts have given the principle of statutory construction enunciated in *Hassett v. Welch*, supra. The decision of the court below in rejecting such principle not only conflicts with prior decisions of this Court and other federal courts but also would perpetuate an erroneous result Congress in 1956 quite obviously believed it had to correct and was trying to correct.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY DOW
EDMUND L. COGBURN
BERNARD O. DOW
Counsel for Petitioners

January 3, 1964

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition For A Writ of Certiorari was served on Woodow Seals, United States Attorney, by depositing same in a United States mail box, with first class postage prepaid, addressed to him at United States Courthouse, 515 Rusk, Houston, Texas; and that a copy was served on the Solicitor General of the United States by depositing same in a United States mail box, with airmail postage prepaid addressed to him at the Department of Justice, Washington 25, D.C.

/Harry Dow

HARRY DOW

APPENDIX A

1. *Pre 1948 Amendments Version*

Internal Revenue Code of 1939:

SUBCHAPTER A - BASIC ESTATE TAX

* * * * *

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption.* An exemption of $100,000;

* * * * *

(c) *Property Previously Taxed.*—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance; or which can be identified as having been acquired in exchange for property so received.

SUBCHAPTER B — ADDITIONAL ESTATE TAX

SEC. 935. RATE OF TAX.

* * * * *

(c) For the purpose of this section the value of the net estate shall be determined as provided in subchapter A,

except that in lieu of the exemption of $100,000 provided in section 812(a), the exemption shall be $60,000.00.

(26 U.S.C. 1952 ed., Sec. 935).

2. *Post 1948 Amendments Version*

Internal Revenue Code of 1939:

SUBCHAPTER A — BASIC ESTATE TAX

* * * * *

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption.* An exemption of $100,000;

* * * * *

(c) *Property Previously Taxed.* — An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received.

* * * * *

The following property shall not, for the purpose of this subsection, be considered as property with respect to

which a deduction may be allowed; (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act of 1948 from a donor who at the time of the gift was the decedent's spouse and (C) property acquired in exchange for property described in clause (A) or (B).

* * * * *

SUBCHAPTER B—ADDITIONAL ESTATE TAX

SEC. 935. RATE OF TAX.

(c) (Not changed — See Appendix A)

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20309

J. C. HURWITZ, JULIAN HURWITZ, JOHN GOLDBERG, and LILLIAN HURWITZ GOLDBERG, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(August 20, 1963.)

Before TUTTLE, Chief Judge, and RIVES and MOORE,* Circuit Judges.

PER CURIAM: We have carefully read the opinion of the District Court, 208 F.Supp. 594 (Southern District of Texas). This opinion, written by Judge Joseph C. Hutcheson, Jr., of this Court, sitting as a District Judge, carefully poses the issues and treats fully and carefully with the legal principles involved. Concluding, as we do, that the result arrived at by the District Court is correct and that the reasons assigned for reaching its conclusion persuade us of its correctness, we affirm the judgment on the opinion of the trial court. Any further or more elaborate exposition of our views would be necessary.

The judgment is AFFIRMED.

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*Of the Second Circuit, sitting by designation

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 728

J. C. HURWITZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (R. 36–44) is reported at 208 F. Supp. 594.[1] The per curiam opinion of the court of appeals (Pet. 12) is reported at 320 F. 2d 911.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1963. (Pet. 2, 12.) A petition for rehearing was denied on October 9, 1963. (Pet. 2.) The petition for a writ of certiorari was filed on

[1] The opinion was written by the Honorable J. C. Hutcheson, Jr., Judge, United States Court of Appeals, sitting as a District Judge in this case. (R. 4, 44–45.)

January 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that the 1948 amendment to Section 812(c) of the Internal Revenue Code of 1939, eliminating the deduction for property previously taxed in cases in which the prior decedent was the spouse of the present decedent, applies both to the basic estate tax and the additional estate tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SUBCHAPTER A—BASIC ESTATE TAX

* * * * *

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption.*—An exemption of $100,000;

* * * * *

(c) [as amended by Sec. 407(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798; and Sec. 362 of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Property Previously Taxed.*—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or in-

heritance, or which can be identified as having been acquired in exchange for property so received. * * *

* * * * *

The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act of 1948 from a donor who at the time of the gift was the decedent's spouse, and (C) property acquired in exchange for property described in clause (A) or (B).

* * * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SUBCHAPTER B—ADDITIONAL ESTATE TAX

SEC. 935. RATE OF TAX.

(a) In addition to the estate tax imposed by section 810 or 860, there shall be imposed upon the transfer of the net estate of every decedent dying after the date of the enactment of this title, whether a citizen or resident of the United States or nonresident not a citizen of the United States, a tax * * *

* * * * * *

(c) [as amended by Sec. 414(a) of the Revenue Act of 1942, *supra*] For the purposes of this section the value of the net estate shall be determined as provided in subchapter A, except that in lieu of the exemption of $100,000

provided in section 812(a), the exemption shall be $60,000.

(26 U.S.C. 1952 ed., Sec. 935.)

STATEMENT

Benjamin Samuel Hurwitz, the decedent, died on September 27, 1952. The federal estate tax return filed for his estate showed a gross estate of $325,755.15, including the sum of $145,543.06 which had been bequeathed to the decedent by his wife and taxed in her estate. Decedent's wife died testate on June 22, 1948. (R. 36–37.) The taxpayers, who are the executors of the decedent's estate, contend that, in computing the "additional estate tax" imposed by § 935 of the Code, $95,433.57 should be allowed as a deduction for property previously taxed in the estate of the wife. Taxpayers raise no question as to the basic estate tax, but only as to the computation of the additional tax. (R. 37.)

The district court upheld the government's contention that the deduction which taxpayers claim in computing the net estate for purposes of the additional tax is not allowable to them and, accordingly, the district court granted the motion of the government for judgment on the pleadings. The court of appeals affirmed *per curiam*. (R. 44–45; Pet. 12.)

ARGUMENT

Chapter 3 of the Internal Revenue Code of 1939 imposes (in subchapter A (§§ 800–931)), a "basic estate tax," and (in subchapter B (§§ 935–939)) an "additional estate tax." Both taxes are computed upon the decedent's net estate, *i.e.*, the gross estate less specified

deductions (§ 812). Section 812(c) allows a deduction for the value of property previously taxed in the estate of another decedent who died five years prior to the death of the present decedent. Section 935(c) provides that for purposes of the additional tax, the net estate shall be computed in the same manner as for the basic tax, "except that in lieu of the exemption of $100,000 provided in § 812(a), the exemption shall be $60,000." The Revenue Act of 1948 amended § 812(c) by adding the following paragraph:

> The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse * * *.[2]

This amendment was adopted at the same time as the provision creating the marital deduction (§ 812(e) of the 1939 Code, as added by § 361 of the Revenue Act of 1948) (see *Meyer* v. *United States*, 364 U.S. 410; *United States* v. *Stapf*, decided December 2, 1963 (No. 54, this Term)). It apparently reflected a Congressional decision that the marital deduction

[2] The law was completely revised by § 2013 of the 1954 Internal Revenue Code, but that provision operates only prospectively and is therefore inapplicable here. The new law (§ 2013 of the 1954 Code) provides for a credit for tax on prior transfers instead of a deduction for property previously taxed (see *United States* v. *Denison*, 318 F. 2d 819, 821–822 (C.A. 5th)), and the credit extends to property acquired from a spouse, but is, however, limited to the tax paid by the estate of the prior decedent upon that part of the property which did not qualify for the marital deduction. See Lowndes and Kramer, *Federal Estate and Gift Taxes*, (2d ed., 1962), p. 541.

should be the exclusive "interspousal" deduction. See S. Rep. No. 1013 (Part 2), 80th Cong., 2d Sess., pp. 21–23 (1948–1 Cum. Bull. 331, 346–347); Rudick, *Property Previously Taxed,* 53 Col. L. Rev. 761, 778 (1953).

The taxpayers maintain that the 1948 amendment to § 812(c) changes the definition of "net estate" only for purposes of the basic estate tax and not for purposes of the additional tax. They rely upon the canon of construction, alluded to by this Court in *Hassett* v. *Welch,* 303 U.S. 303, that where one statute (§ 935(c)) incorporates the terms of another (§ 812(c)), it takes the adopted statute as it exists at the time of adoption and does not include subsequent amendments unless a contrary intent is expressly indicated.[3] This contention is groundless. As the district court pointed out, the rule of construction upon which taxpayers rely is chiefly applicable in cases where a statute of one jurisdiction is incorporated into the laws of another.

[3] *Hassett* v. *Welch* itself is readily distinguishable. That case involved § 302(c) of the Revenue Act of 1926, which included in the decedent's gross estate any property interest of which he had at any time made a transfer in contemplation of, or intended to take effect in possession or enjoyment at or after death. Section 302(h) provided that § 302(c) would apply to such transfers whether made before or after the enactment of the Act. In 1931, § 302(c) was amended to include transfers of property with a retained life estate. The Court held that the amendment applied only prospectively, *i.e.*, was not "adopted" by § 302(h). While the Court alluded to the canon of construction relied upon by the taxpayers here, its decision chiefly rested upon the legislative history of the amendment, the consistent administrative interpretation in light of which the amendment was reenacted in 1932, and the general presumption that statutes do not operate retroactively.

In that situation, the adopting legislature has no continuing control over the contents of the adopted statute, and presumably does not intend that its own law should be dependent upon future action by another legislature. There is much less justification for the rule where, as here, the adopting and adopted statutes emanate from the same source and are integral parts of a single legislative scheme, since the legislature can easily make desired adjustments in the former at the time it revises the latter. Thus, if Congress, in amending § 812(c) had intended to define the concept of "net estate" differently for purposes of the additional tax than for purposes of the basic tax, it would undoubtedly have so provided, either in § 812 itself or in § 935(c).

It is evident, however, that Congress had no such intent. The manifest purpose of § 935(c) was not to adopt the specific deduction provisions of subchapter A as they stood in 1932 (the year subchapter B, including § 935(c), was enacted) but to make applicable to the entire estate-tax system the definition of "net estate" laid down in subchapter A. It is subchapter A which states what property is subject to the estate tax, sets forth the allowable deductions, prescribes the method of assessment and collection, and sets the basic rates. The sole function of subchapter B is to increase the effective estate tax rates. What § 935(c) does is simply to provide that these additional rates are to be applied to the same base amount as the subchapter A rates.

To apply taxpayer's rule of construction to § 935(c) would produce preposterous results. The basic tax is

a relatively insignificant element of the overall estate tax (ranging from 1% to 7% for net estates up to $1,000,000—§ 810); for practical purposes, the additional tax (from 3% to 37% on estates up to $1,000,000—§ 935(b)) *is* the estate tax. The taxpayers' construction would mean that every amendment since 1932 which affected the definition of the net estate—including the marital deduction itself—would be inapplicable in computing the main estate tax, contrary to the universal understanding and the consistent administrative practice.

CONCLUSION

The decision below is correct and, for the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
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